

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

BOARD NO. 014474-01

Samuel A. Caruso
Hair Club for Men
Public Service Mutual Insurance Co.

Employee
Employer
Insurer

REVIEWING BOARD DECISION

(Judges Carroll, Costigan and McCarthy)

APPEARANCES

William J. Gately, Jr., Esq., for the employee
Paul R. Matthews, Esq., for the insurer

CARROLL, J. The insurer appeals from a decision in which an administrative judge awarded the employee benefits for an emotional injury sustained as a result of an event at work. The insurer challenges the judge's finding that the event was the predominant contributing cause of the employee's emotional disability, as per the applicable provision of G. L. c. 152, § 1(7A). We summarily affirm the decision on this point, because the deposition testimony of the impartial physician, as adopted and found by the judge, was that the work event was the predominant contributing cause, in that it was "the single most important, influential or forceful cause of medical disability." (Dec. 13; Dep. 28-29, 33.) See Siano v. Specialty Bolt & Screw, Inc., 16 Mass. Workers' Comp. Rep. 237, 240 (2002). We cannot say that the judge's finding, or his legal conclusion drawn therefrom, is arbitrary, capricious or contrary to law. G. L. c. 152, § 11C. The insurer also argues that the judge failed to apply the § 1(7A) provision exempting bona fide personnel actions from the scope of liability for emotional work injuries. We agree, and therefore recommit the case for further findings.

The employee, Samuel Caruso, worked as a sales consultant for the employer, starting in October 1996. (Dec. 3.) During the time with the employer, he experienced various instances of harassment due to his sexual orientation. When the employee was transferred to work in the employer's Boston office in January 2001, he had a difficult

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relationship with a new supervisor, Randy Paris. The employee experienced Mr. Paris as picking on him, and treating him in a demeaning manner. (Dec. 4-5.) Then, on April 21, 2001, the employee had a hostile telephone conversation with Mr. Paris regarding a commission, which is recounted in full below. As a result of this event, the employee broke out in a cold sweat, turned white and the right side of his face burned. (Dec. 5-6.) He became nauseated, but completed the workday. The next morning he awoke with his face numb. He did not return to work. (Dec. 6.)

The employee's facial numbness did not go away, and he also started having hearing and speech difficulties, and occasional blurred vision in his right eye. He experiences insomnia, nightmares and cold sweats, and treats with an ear, nose and throat specialist, a psychologist, a neurologist, a dermatologist, an ophthalmologist and his primary care physician. (Dec. 6.)

The employee claimed workers' compensation benefits for emotional injury, which claim the insurer did not accept, and which was denied at the § 10A conference. He appealed that denial to a full evidentiary hearing. (Dec. 2.)

The employee underwent an impartial medical examination by a board certified psychiatrist, Dr. Marc Whaley. Dr. Whaley opined that the employee suffered from features of post traumatic stress disorder, major depression and conversion disorder, all causally related to his encounters with his supervisor, Mr. Paris. Dr. Whaley noted that the employee's father was terminally ill, which added significant stress to the employee's life. Nonetheless, it was Dr. Whaley's opinion that the workplace experiences brought out the employee's psychiatric symptomatology. (Dec. 9.) Dr. Whaley felt that the employee was too troubled by anxiety problems and concentration difficulties related to his workplace trauma to be gainfully employed, but that further treatment could enable him to return to work at a different job. (Dec. 10.) At his deposition, Dr. Whaley directly related the employee's post traumatic stress disorder and conversion disorder to the employee's April 21, 2001 telephone conversation with Mr. Paris. (Dec. 10-11.) Finally, Dr. Whaley opined at his deposition that the hostile telephone conversation with

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Mr. Paris was the predominant cause of the employee's conversion reaction, by which physical symptoms emerged in April 2001 for no other apparent reason. (Dec. 11-12.)

The judge adopted Dr. Whaley's opinions, and concluded that the employee's conversation with his supervisor, Mr. Paris, was the predominant contributing cause of his disability. (Dec. 13.) The judge performed a proper vocational analysis under Frennier's Case, 318 Mass. 365 (1945), and Scheffler's Case, 419 Mass. 251, 256 (1994), and concluded that the employee was partially incapacitated, with an earning capacity of \$400 per week, ongoing from April 21, 2001. (Dec. 16.)

The focus of the insurer's appeal on the issue of whether the employee's claim for emotional injury is barred by the bona fide personnel action exception are the following findings regarding the event of April 21, 2001:

Mr. Caruso credibly testified regarding an incident where he sold an individual hair rather than a trichology program [scalp treatment]. This occurred on April 21, 2001. Apparently the customer had originally been sold the trichology program by another employee. Because the customer lacked sufficient hair, the employee felt that he was not a suitable candidate for trichology. The customer apparently appreciated the appearance of Mr. Caruso's hair and decided that he wished to undergo hair replacement rather than a scalp treatment. Obviously, this upgraded sale generated additional income for the Club and would continue to generate ongoing income for additional services. Following the sale, the employee received a call from Mr. Paris who congratulated him on the sale, but then indicated that he was giving the commission to the original salesperson. Mr. Paris had apparently already discussed the situation with that individual. The employee felt that this was unfair and that he should receive the commission as he had made the upgraded sale. *Mr. Paris responded that he could do whatever he wanted; that he was the "big shot" and could change the rules if he needed to. (Tr. 22). The conversation continued and became somewhat heated. The employee asked Mr. Paris to lower his voice and told him that he did not want to be yelled at further. Mr. Paris indicated that he would talk to him any way he wanted to.* The employee then hung up. He immediately broke out in a cold sweat, the right side of his face burned and he turned white. He became nauseous but completed his workday and went home. The next day when he awoke, his face was numb. The employee returned to work on the following Tuesday, April 24, 2001 and spoke to the owner of the company, Mr. Bach. He has not returned since nor has he looked for other work.

(Dec. 5-6; emphasis added.) It is this event that the medical evidence established as the causal connection between the work and the employee's emotional disability, an opinion that the judge relied upon in awarding benefits. (Dec. 13-15.) In assessing the emotional impact of the work event, however, the judge needed to apply, and make findings addressing, the requisite statutory provisions under § 1(7A) regarding emotional injuries. As we have stated, the medical evidence supported the conclusion that the work event was the predominant cause of the employee's emotional disability, and the judge's findings on that point are sound. (Dec. 15.) However, the judge failed to assess the other required statutory factor, which mandates that we recommit the case for further findings. That factor is the bona fide personnel action exception to emotional injuries:

No mental or emotional disability arising principally out of a bona fide, personnel action including a transfer, promotion, demotion, or termination except such action which is the intentional infliction of emotional harm shall be deemed to be a personal injury within the meaning of this chapter.

G.L. c. 152, § 1(7A).¹

Emotional injuries must pass the bona fide personnel action hurdle in order to be considered compensable.

[U]pon a finding that a work event or series of events were a [predominant] contributing cause of mental or emotional impairment . . . the judge [must] then go on to make findings of whether the "disability arose principally out of a *bona fide*, personnel action including a transfer, promotion, demotion or termination[.]" § 1(7A). There is no liability if the event or events are deemed a *bona fide* personnel action, in the absence of intentional infliction of emotional harm.

Walczak v. Massachusetts Rehabilitation Comm'n, 10 Mass. Workers' Comp. Rep. 539, 542 (1996). And, as in Walczak, the judge here "omitted this segment of the analysis," thus requiring recommitment. Id. See also Babayan v. Secretary of State, 16 Mass. Workers' Comp. Rep. 19, 21 (2002). Certainly, where (as here) the "event" alleged as the cause of the emotional harm was the action of the employee's supervisor, need for the bona fide personnel action analysis is particularly pressing.

¹ G.L.c. 152, §29, includes this same language.

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We therefore recommit the case for further findings as to whether the conduct of the employee's supervisor on April 21, 2001 was the intentional infliction of emotional harm in the circumstance of an otherwise bona fide personnel action. See Anderson v. General Elec. Co., 10 Mass. Workers' Comp. Rep. 801, 803-804 (1996).

So ordered.

Martine Carroll
Administrative Law Judge

Patricia A. Costigan
Administrative Law Judge

Filed: **May 25, 2004**

William A. McCarthy
Administrative Law Judge